IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19.12.2007

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

and

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

Original Side Appeal Nos.460 and 461 of 2002

Aban Offshore Limited
No.96, Pantheon Road
Chennai - 8. Appellant in both O.S.As/ Petitioner in O.P.458/99 and ISt Respondent O.P.704/99

The name of the appellant was amended as above from "Aban Lloyd Chiles Offshore Limited" as per orders of this Court dated 12.12.2007 made in C.M.P.Nos.3369 and 3370 of 2007

v.

1. Oil & Natural Gas Corporation Limited
No.8, Gandhi Irvin Road
Chennai - 8 ... ISt Respondent in O.P.458/99/ Petitioner in O.P.704/99

2. Mr.Justice Sathar Sayed (Retd.,)
No.214, Anna Nagar,
Chennai - 40. .... Respondents in both O.S.As

Original Side Appeal Nos.460 and 461 of 2002 are preferred against the order and decree dated 21.6.2002 made in O.P. Nos.458 of 1999 and 704 of 1999 respectively by learned single Judge of this Court.

For Appellant : Mr.Santosh Ukkur

For Respondent 1: Mr.P.Rathinadurai

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JUDGMENT

K. RAVIRAJA PANDIAN, J.

The appellant – contractor filed these two appeals against the common order of the learned single Judge made in O.P.No.458 of 1999 filed under Section 14(2) of the Arbitration Act, 1940 seeking for the relief of directing the second respondent -Umpire to cause the filing of the award dated 12.4.1999 rendered by him in the reference made to him by the arbitrators and praying the Court to pronounce the judgment and decree in terms of the award and O.P.No.704 of 1999 filed by the respondent under Section 30 of the Arbitration Act, 1940 to set aside the said award passed by the second respondent – Umpire.

2. By common order dated 21.6.2002 in those two O.Ps, the learned single Judge has set aside the order of the Umpire dated 12.4.1999 on the premise that the award came to be passed by travelling outside the terms of the contract and the award was the outcome of irreasonable, irrational and capricious act of the Umpire.

3. The learned counsel appearing for the appellant has contended that the learned single Judge has erred in setting aside the well considered award by making a roving enquiry on facts and an extensive re-appreciation of evidence as if he is sitting on appeal against the award, which is impermissible in law. He further contended that the learned single Judge has totally lost sight of the provisions of the substantive law such as Sections 54, 55 and 63 of the Contract Act and erroneously set aside the award. He has further taken us through the contract dated 18.3.1992 and elaborated his argument on the facts of the case to convince us that the order of the learned single Judge setting aside the award is illegal and against the well established proposition of law.

4. Per contra, the learned counsel appearing for the first respondent has reiterated the reasoning given by the learned single Judge for sustaining the order and contended that the order impugned cannot be challenged on any legal ground when ex facie the award was found to be a capricious one.

5. The necessary facts for the purpose of resolution of the dispute in this case are as follows:

The respondent Oil and Natural Gas Commission, a body corporate established by Oil and Natural Gas Commission Act, 1959 floated a tender for drilling of one well on off-shore at an area located as "Raava 'A'" in Krishna Godavari Basin. The appellant company become the successful bidder. On 1.1.1992, the respondent issued a letter of intend and by proceedings dated 4.3.1992 identified the location of "Raava 'A'. In order to execute the drilling operation, it was the case of the appellant that on

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14.3.1992 at 13.10 hours, the appellant started voyage of its Rig Griffin Alexander – II by towing by two tow boats from Pondicherry where the Rig was stationed at that time. The appellant claimed that the Rig reached the vicinity i.e., near ten nautical miles of the location on 17.3.1992 at 13.30 hours. But the respondent had filed to make necessary preparation to enable the Rig to move to the exact location of "Raava 'A' and jack up. Because of the failure of the respondent in making provision to receive the Rig to the location "Raava 'A'", the Rig was required to be towed away to deeper water as it could not be stationed at shallow water at the reached point. The respondent made preparation to receive the Rig at the located point at "Raava 'A' on 18.3.1992. The Rig towed to deeper water had caught in under water current and drifted further away. In view of the above drifting of the Rig away from the point "Raava 'A', the Rig could reach the location only on 28.3.1992 and virtually the positioning and jacking up was made on 2.4.1992.

6. It was the case of the appellant that the act of the respondent not received the Rig on 17.3.1992 to the location amounts to denial of access and in turn amounted to contractual violation and therefore the respondent was liable to meet the cost at the rate of non-operating day rate for the period from 17.3.1992 to 2.4.1992 as per Article 3.4.2 of the contract. The appellant further claimed a sum of Rs.90 lakhs on account of the towing boat hire charges illegally and unilaterally deducted by the respondent on the premise that the appellant was liable to pay towing boat hire charges till the Rig was jacked despite the fact that the boats were hired till the Rig reaches the location. Therefore, after 17.3.1992 the appellants were not liable to pay the hire charges for the towing boats. Thus, the appellant claimed non-operating day rate from 13.30 hours on 17.3.1992 to 22.30 hours on 2.4.1992 at the rate of Rs.3,90,500/- per day, in all, Rs.63,94,440/- and a sum of Rs.90 lakhs on account of boat hire charges deducted from the bill of the appellant. The appellant further claimed interest at the rate of 18 percent over that amount.

7. The respondent denied the claim on the first count by contending inter alia that under the tender conditions, the appellant was given time 180 days to mobilise the rig at the location to be pointed out by the respondent. The respondent was not informed of about the estimated time of arrival of the Rig to the location. The off-shore vessel (OSV) Feroze Gandhi was to carry out the placing of marker buoy by reaching the actual spot. The said vessel had carried supplies on 17.3.1992 and delivered supplies to other Rigs such as Badrinath and Sagar Prabhat. The supply vessel Feroze Gandhi was in touch with the person in charge of the Rig of the appellant on all days i.e., on 18.3.1992 and 19.3.1992 and instructed to slow down the speed of towing boats. The placing of the marker buoy on 18.3.1992 was well within the knowledge of the appellant even before the Rig reached the vicinity. But the appellant could not despite such information took

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efforts to reach the spot to position the Rig until 2.4.1992. That was evident from the message sent by the respondent on 27.3.1992 that the Rig would reach the position on 28.3.1992 and was jacked on 2.4.1992.

8. It was the further case of the respondent that in the claim statement itself the appellant candidly admitted that after 18.3.1992, the Rig made an attempt to approach the location, which was not successful due to the bad condition of the sea. Hence, the respondent is not liable to meet the non-operating charges as claimed by the appellant. In respect of boat hiring charges, it was the case of the respondent that Exs.C.1 and C.45, the letter of indent and the contract were abundantly clear that no mobilisation charges would be payable by the respondent and the respondent would not provide the boat for towing the drilling unit to the designated location. On the face of the conditions contained in the contract, the claim was not sustainable. As the respondent denied their liability in respect of non-operating charges and the reimbursement of boat hiring charges, consequently denied the interest claimed by the appellant. Thus dispute arose.

9. The matter was referred to the two arbitrators, Justice S.Padmanabhan and Justice K.Swami Durai entered the reference. Both the arbitrators agreed that the dispute raised by the appellant was covered by the contract dated 18.3.1992. However, with regard to the individual claims, one of the arbitrators - Justice S.Padmanabhan was of the view that the appellant was not entitled to any amount, however Justice K.Swami Durai was of the view that the appellant would be entitled to Rs.1,04,83,000/- on account of principal towards non-operating charges and deduction of boat hiring charges and Rs.69,18,780/- towards interest at the rate of 18% per annum from 2.5.1992 till 12.1.1996 and thereafter till the date of payment at the same rate on the principal sum awarded. The difference in the view of the two arbitrators was the reason for the Umpire Justice Sathar Sayed to take the matter for adjudication, who ultimately agreed with the view of Justice K.Swami Durai and passed an award on 12.4.1999 as aforesaid.

10. The respondent filed O.P.No.704 of 1999 to set aside the award and the appellant filed O.P.No.458 of 1999 for pronouncing a judgment and decree in terms of the award. The learned single Judge by reason of the impugned order allowed O.P.No.704 of 1999 by setting aside the award dated 12.4.1999 and dismissed O.P.No.458 of 1999. The correctness of the same is canvassed in these appeals. The contention of the parties has already been stated in the earlier paragraphs of this judgment.

11. We heard the argument of the learned counsel on either side and perused the materials on record.

12. The letter of indent dated 1.1.1992 marked as Ex.C.1 was specific that the Rig should be mobilised at the location within

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180 days and that no boats shall be provided for towing of the drilling unit from last drilling location to sheltered waters in the vicinity of the area of operations or any other de-mobilising point. As per Article 3.2 of the agreement, Ex.C.45, no mobilisation charges were payable to the appellant. It is the agreed term that the respondent shall not provide boats for towing of the drilling unit to designated location. Drilling unit is to be mobilised from the drilling unit's present location to the well location to be designated by respondent by the appellant. Article 3.3 of the agreement provided that no demobilisation charges were payable under the agreement. No boats shall be provided for towing of drilling unit to sheltered waters or any other demobilisation point. Article 3.4 of the agreement provided that the appellant would be entitled to an applicable day rate as stipulated in Articles 3.4.1, 3.4.2, 3.4.3 or 3.4.4 as the case might be from the time drilling unit was ready in all respects and was duly jacked up and ready to spud the first well till the expiry of the agreement, when the drilling unit was ready for jacking down, at the location except when specifically otherwise provided for under the agreement. Article 3.4.1 provided that the appellant shall be paid an operating day rate of Rs.3,92,500/- when the drilling unit was in operation. As per Article 3.4.2, the non-operating day rate of Rs.3,90,500/- shall be paid when the drilling unit was not operating and was either waiting for materials/ orders/ instructions/ programme / waiting on weather/ waiting on cement to set, except where otherwise provided for in the agreement. Article 3.4.3 provided that the the programme being one well programme, payment of moving day rate was not applicable. These articles were re-produced in Ex.C.1, the letter of indent.

13. Despite these agreed and accepted terms and conditions incorporated in the contract, the appellant attributing delay on the part of the respondent as stated earlier claimed and obtained an award. Here again, even assuming that the fault was attributable to the respondent, Article 26 of the agreement provided that notwithstanding either party's fault, neither party shall be liable to the other party in respect of any consequential damages whatsoever. Thus, on the face of the above specific conditions the appellant could not succeed in its claim.

14. The appellant by their letter dated 5.3.1992 Ex.R.1 requested the respondent to provide two supply vessels (two boats) on chargeable basis. The boats were used for towing the Rig till it was jacked on 2.4.1992 by the appellant. The hire charges for the same is disputed on the same reasoning that the delay from 17.3.1992 to 2.4.1992 was caused by the respondent. For the same reasons which we have stated for non-operating day rate this claim also cannot be legally sustainable.

15. Learned counsel appearing for the appellant has sought to place reliance on Sections 54 and 55 of the Contract Act to contend that in a reciprocal promise, the default as to that promise which

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should be first performed would entitle to the second performer to claim compensation for the loss sustained by him and further contention that failure to perform the contract within the time fixed was voidable at the instance of the party affected. We are not able to accept the submission made by the learned counsel for the appellant as we already concluded that the delay from 17.3.1992 to 2.4.1992 in bringing the rig to the designated position and jacking it could not be attributable to the respondent, there is no question of invoking Sections 54 or 55 of the Contract Act. Even assuming for the sake of argument that the above provisions are applicable, the appellant has not avoided the contract on account of the alleged delay on the part of the respondent.

16. By letter dated 4.3.1992, the respondent furnished the details of the designated location for mobilisation of the drilling rig by the appellant, which was marked as Ex.C.2. By letter dated 9.3.1992, which was marked as Ex.C.3, the respondent furnished the appellant the further particulars about the designated location on the basis of Seabed Inspection and Survey conducted by M/s.Elcome Surveys Private Limited. On 14.3.1992, the appellant commenced towing the rig towards designated location "Raava 'A'. It could be seen from Ex.R.5 dated 16.3.1992 that the expected time of arrival of the Rig was at 18.00 hours in the evening of 17.3.1992. However, it could be seen from the above Exhibit that the tow boats were required to reduce the speed to arrive at the location on 18.3.1992 as the Survey vessel Feroze Gandhi was yet to arrive at the location to place the marker buoys. However, the Rig reached ten nautical miles away from the location on 17.3.1992 on the stated reason of under current water speed. On 18.3.1992, the vessel Feroze Gandhi reached the designated location, the marker buoys were dropped on the same day at 10.20 a.m and informed the respondent to tow Rig to the location. There are several contacts and communications between the parties on 18.3.1992 for towing the Rig to the location. The Rig was not able to be travelled because of the bad sea condition. On 20.3.1992, the supply vessel Nand Panna was replaced by another supply vessel Malaviya-II. On 23.3.1992, the vessel Feroz Gandhi joined as a third vessel to tow the Rig. On 27.3.1992, the appellant informed that the Rig would be expected to reach the location on 28.3.1992 and as such reached the location at 13.10 hours. Ultimately on 2.4.1992, at 22.30 hours, the Rig was positioned at the location and jacked up. On the face of the accepted reasoning that the towing of the jack was required to be slowed down periodically, as the off shore vessel Feroze Gandhi was expected to reach the location only on 18.3.1992 and on the specified day of 18.3.1992, the location was ready by placing the marker buoy for jacking up the Rig with reference to the articles stated above, we are of the view that the respondent cannot be stated to be faulted.

17. Article 26 of the contract is also very specific to the effect that "notwithstanding either party's fault, neither party

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shall be liable to other party in respect of any consequential damage, what so ever.

18. When the two issues which are the basic issues were held against the appellant, the consequential issue of granting interest has necessarily followed to be held against the appellant and that is what done by the learned single Judge.

19. The learned single Judge after surveying a catena of decisions of this Court, Supreme Court and other High Courts, has summarised the position of law on the subject to the effect that the arbitrator/Umpire cannot travel outside the bounds of the contract and cannot enlarge the scope of reference by choosing to decide the question of dispute or reference not referred to him. The arbitrator cannot ignore the material documents and base the award on no evidence. The arbitrators/umpire could not misdirect themselves which would cause substantial miscarriage of justice. There should not be any defect in the procedure followed by him in deciding the arbitration award. They should act within their jurisdiction. They cannot act arbitrarily, irrationally, capriciously, and independently of the contract. Even if the arbitrators have acted within the ambit as per the contract, and if the reasons are regarded as errors apparent on the face of the record, the Court can interfere with the award, vide JIVARAJBHAI UJAMSHI SHETH VS. CHINTAMANRAO BALAJI (AIR 1965 SC 214), K.P.PAULOSE VS. STATE OF KERALA (AIR 1975 SC 1259), M/S.TARAPORE & CO. VS. COCHIN SHIPYARD LTD., COCHIN (AIR 1984 SC 1072), M/S.SUDARSHAN TRADING CO. VS. GOVERNMENT OF KERALA ((1989) 2 SCC 38), FOOD CORPORATION OF INDIA VS. JOGINDERPAL MOHINDERPAL (1989(2) SCC 347), P.M.PAUL VS. UNION OF INDIA (AIR 1989 SC 1034), ASSOCIATED ENGINEERING CO., VS. GOVERNMENT OF ANDHRA PRADESH (AIR 1992 SC 232), STATE OF KERALA VS. K.KURIAN P.PAUL (AIR 1992 KERALA 180(DB), CHAHAL ENGINEERING & CONSTRUCTION CO., VS. IRRIGATION DEPARTMENT, PUNJAB (AIR 1993 SC 2541), STATE OF U.P. VS. RAM NATH INTERNATIONAL CONST. PVT. LTD. (AIR 1996 SC 782) and MUNICIPAL CORPORATION OF GREATER BOMBAY VS. THERMAL ENGINEERING CORPORATION (1997(2) Arb. LR 361).

20. The learned single Judge has extensively referred to the provisions of the substantive law viz., contract Act i.e., Sections 54 and 55 of the Contract Act and the decisions rendered on it and ultimately come to the conclusion that though the respondent had knowledge that the towing had commenced on 14.3.1992 it had no intimation that the estimated time of arrival has been updated from 18.3.1992 to 17.3.1992 and that there was no request made on behalf of the appellant requesting the respondent to drop the marker buoys and carry out the seabed inspection on the reasoning that the estimated time of arrival had been updated from 18.3.1992 to 17.3.1992 evening. The learned Judge further found that assuming that the respondent knew about the progress of updating of the ETA from 18.3.1992 to 17.3.1992, still the appellant knew that Feroze Gandhi was leaving Madras on 17.3.1992 or 18.3.1992 and was

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expected to be at the location only on 18.3.1992 afternoon and thereafter only the location would be surveyed and marker buoys would be placed. Even this factum has been informed to the appellant and further request was made to the appellant to slow down the speed of the towing boats so as to delay itself in reaching the location by 18.3.1992 afternoon. In spite of that, apparently because of the sea current, the speed of the towing boats could not be reduced and the Rig reached the vicinity of the location on 17.3.1992 Afternoon. There was admittedly at that time it was not expected of from the respondent to fix the marker buoys and conducted the sea bed survey.

21. In the teeth of the covenants contained in the agreement and on the face of the reasoning, we are of the view that the learned single Judge has correctly held that the Umpire has travelled beyond the terms of agreement by way of sympathy or taking cause of the appellant and granted the relief. As we have come to the above said conclusion, the necessary corollary would be we find no reason to interfere with the order of the learned single Judge on merits.

23. In the result, the Original Side Appeals are dismissed. However, there is no order as to costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

The Sub-Asst.Registrar
Original side,
High Court, Madras.

1 cc to Mr.P. Rathinadurai, Advocate, Sr. 75232
2 ccs to Mr. Santhosh Ukkar, Advocate, Sr. 75069, 75070

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